1343 No. 3989

1343

United States
Circuit Court of Appeals

For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Appellant's Brief

Upon Appeal from the Supreme Court for the Territory of Hawaii.

HENRY HOLMES,
H. EDMONDSON,
Attorneys for Appellants.

Filed this ..... day of ....., 1923.

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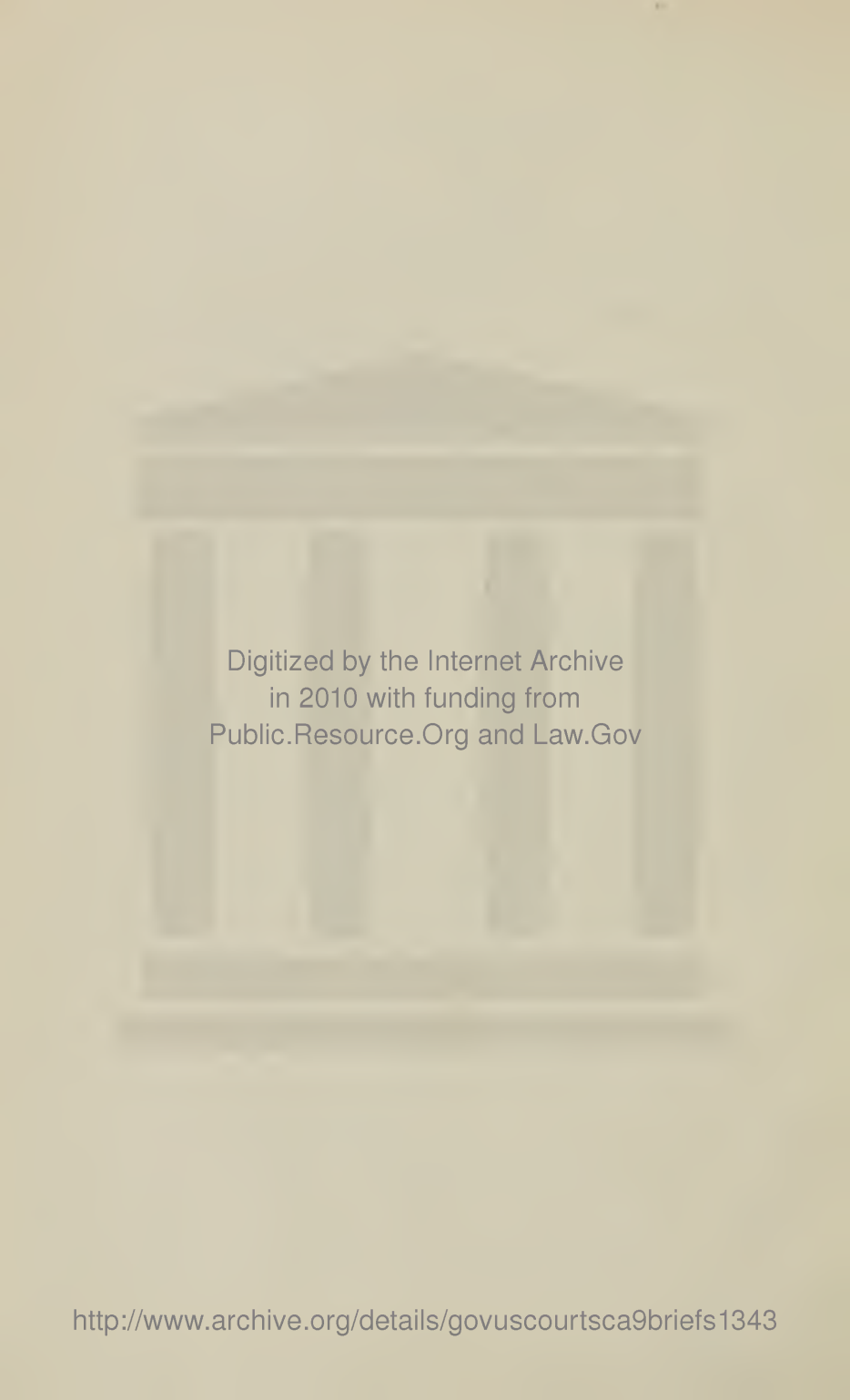

No. 3989

United States
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For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

APPELLANTS' BRIEF.

THE CASE.

The Trustees Appellees. filed a bill in equity for instructions as to their duties as trustees under the will

of James Gay, deceased. All parties in being interested under the will were made respondents; they are the children and grandchildren of the testator; the minors are the grandchildren, by their guardian ad litem appellants, to whom the corpus, with all additions or increase of the estate was given; the appellees other than the Trustees are the surviving children for whose maintenance and support for life the Trustees were directed to pay the income of the estate. (Record 1-16)

The will gave all testator's estate to trustees in trust to pay the rents, income, issues and profits arising from and out of said estate to testator's widow for her life and after her death for the support and maintenance of his children, including the education of his daughters, for their lives and after their death to convey one-half of said trust estate and all additions or increase thereto to the children of testator's sons, and as to the remaining portion of said trust estate and all additions or increase thereof to convey the same to the children of his daughters. This disposition of the estate was followed by a direction to manage and carry on testator's business so long as it could be done so profitably, and a power to the trustees in their discretion when they thought a sale of all testator's property at Mokuleia would by a reinvestment of money realized from a sale be beneficial and inure to the benefit of or increase the trust estate to sell the property at Mokuleia. (Record 13-16)

Testator died in 1893 and his widow died in 1895. (Record 121 and 123) (The statement "Mr. Gay

died, in April 1895" Record 123 is a copyist error and should refer to Mrs. Gay.) His estate consisted of two valuable leaseholds, and other personal property which latter the trustees sold for $4065.00 and hold as corpus. One leasehold at Mokuleia was for a term of fifty years and will expire in 1934; the other leasehold expired in 1908. (Record 121-123) The existing Mokuleia leasehold is still held by the trustees and the property is all sub-let for the unexpired term of the head lease and has produced and still is producing large rentals in excess of the rent paid under the head lease. (Record 127-128) The other lease was held and the property was sub-let by the trustees until the lease expired, and produced net rentals which totaled $34,329.24. (Record 135-136)

The trustees paid all the net rentals of both leaseholds to testator's widow and children as income and set aside no part thereof as corpus. Their counsel questioned this conduct and therefore they brought this suit for instructions whether they should not in the past have set aside and ought not in the future to set aside part of the rents as corpus for testator's grandchildren. (Record 9-11, 125-126).

The existing Mokuleia lease is part of the property at Mokuleia referred to in the will, and we shall hereafter refer to it as the "Mokuleia leasehold". The expired lease we will call the "Ookala leasehold".

The Circuit Judge who heard the case in the first instance approved the trustees' conduct in paying the whole of the net rentals to the wife during her life and on her death to the children. (Record 29-43) The

grandchildren by their guardian ad litem appealed to the Supreme Court of the Territory which partly reversed the Circuit Judge and held:

(1) That the trustees should have sold the Ookala lease and invested the proceeds as corpus, but, as they had retained it, they must set aside out of the rentals its value as part of the corpus of the estate and remanded the cause for an accounting; and

(2) That the trustees, being directed to carry on testator's business and being given a discretionary power of sale of the property at Mokuleia, could, so long as they refrained from selling the Mokuleia leasehold, pay all the net rentals to testator's children as income. (Record 44-63)

The cause having been remanded, (Record 67) the Circuit Judge held that the sums of money, which, if invested at the time of testator's death, with interest at six per cent. per annum with annual rests, would equal the net rentals received, when they were received, from the Ookala leasehold, were corpus, and that the balance of the net rents was income. (Record 70) The grandchildren by their guardian ad litem again appealed to the Supreme Court which sustained the decision of the Circuit Judge (Record 73-78) and a final decree was entered (Record 85) from which for the first time the grandchildren by their guardian ad litem were able to appeal to this Court.

This appeal brings up for review so far as they affect the grandchildren only—as neither the children nor the trustees have taken any appeals at all in the case—both decisions of the Supreme Court.

ASSIGNMENTS OF ERROR

1. The Court erred in not holding that, under the terms of the will dated May 25, 1893, of James Gay, deceased, the net rents, or, their actuarial value as of the testator's death on May 28, 1893, derived from subleases of certain leasehold property held by the testator, at the time of his death, consisting of about 2500 acres of land situate at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, (hereinafter referred to as the "Mokuleia lease"), form part of the corpus of testator's estate given in trust for testator's grandchildren, to wit: the minor respondents above named Appellants.

2. The Court erred in finding ("find" in Record page 89 is a copyist error) and holding that, under the terms of said will, whatever sums the trustees received for the said Mokuleia lease, to wit: the net rents derived from the sub-leases ("sublease" in Record page 89 is a like error) thereof, were income and that the life tenants (being all but one of testator's children named in his will and the issue of one deceased child) were entitled to receive it.

3. The Court erred in not holding under the terms of the said will that it was open to the trustees upon receiving proper security to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Mokuleia lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of

reinvestment of the net rents which comprised part of the corpus of the said estate.

4. The Court erred in not holding under the terms of said will that the trustees thereof, in sub-leasing all the land comprised in the said Mokuleia lease for the unexpired period except the last few days of the said term thereof, in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such sub-leases or their value as of testator's death form part of the corpus of testator's estate.

5. The Court erred in finding and holding under the terms of the said will that the trustees thereof did not, by subleasing all the land comprised in the said Mokuleia lease, in effect, sell the said Mokuleia lease at a price to be paid for in installments; and, that the net amounts received from such sub-leases were not corpus but income of the estate payable to the life tenants.

6. The Court erred in not holding under the terms of the said will that the net rents amounting in the aggregate to $34,329.24, received from sub-leases of certain leasehold property held by the testator at the time of his death, consisting of about 1200 acres of land situate at Humuula, Ookala, Island of Hawaii, for a term of 25 years extended for a further term of 7 years and ultimately expiring March 1, 1908, (hereinafter referred to as the "Ookala lease"), all formed part of the corpus of testator's estate.

7. The Court erred in finding and holding under

the terms of said will that only $20,668.35, a part of $34,329.24, the net rents received by the trustees from sub-leases of the land comprised in the said Ookala lease, should have been invested as capital or corpus of the estate; and that the balance of $13,660.89, a part of said net rents, should be distributed to life tenants as income.

8. The Court erred in not holding under the terms of said will that it was open to the trustees, upon receiving proper security, to give the life tenants the use of the net rents as they were received from sub-leases of the land comprised in the said Ookala lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of re-investment of the net rents which comprised part of the corpus of the said estate.

9. The Court erred in finding and holding under the terms of said will that the trustees at the inception of the trust might not (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen, and that the only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen.

10. The Court erred in finding the issues on the construction of the will for the life tenants, respondents

above named other than said minor respondents.

11. The Court erred in not finding the issues upon the construction of the will for the minor respondents appellants.

12. The Court erred in decreeing that the decree appealed from should be affirmed.

13. The Court erred in not decreeing that the decree appealed from should be set aside.

14. The decree is against the manifest intention of the testator as expressed in his will.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

(Record 89-93)

These assignments of error raise two points: first, and by far the most important, that the net rents or part of them from the Mokuleia leasehold are corpus, and second, the method of determining how much of if not all, the net rents from both leaseholds are corpus.

ARGUMENT

Testator left three sons and four daughters, all of whom, with the exception of one daughter who died in 1902, are appellees. The youngest child is now at the time of writing this brief 33 or 34 years, and the eldest is 45 years old. (Record 123).

Testator's estate consisted of the following property in the Hawaiian Islands:

1. The Mokuleia lease dated May 27, 1884, from J. P. Mendonca to testator, of about 2500 acres of

land at Mokuleia, for 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1250.00.

2. The Ookala lease dated March 1, 1876, from the Government of Hawaii to testator, of about 1200 acres of land at Ookala, for 25 years expiring March 1, 1901, extended during the life of testator for a further term of 7 years expiring March 1, 1908, at a nominal rent or rent free;

3. Cattle, etc., valued at about $2,310.00; and

4. Cash—$816.59.

There was no real estate (Record 121-122)

At the time of his death testator carried on a horse and cattle ranch on part of the Mokuleia leasehold and part of it was sublet to others at gross annual rents amounting to $2,723.50 (Record 123).

The trustees carried on testator's business of stock raising and sub-letting part of the property at Mokuleia until 1906, when they sold all the live stock and set aside the net proceeds of $4,065.00 as corpus, and sub-let for the residue of the term of the head lease the whole of the remainder of the Mokuleia leasehold property and none of the said land was in their actual possession after that date, thus converting their entire land holdings into rents or the right to receive the same. Some of the sub-leases reserved fixed cash rentals and others a one-twentieth part of the produce of sugar cane crops. (Record 123-124).

A statement of rents received from the Mokuleia leasehold property is shown on pages 127-128 of the Record which to save reprinting is incorporated here by reference.

The total rents as shown in the statement viz., $281,033.76, is approximate and is subject to correction. From it must be deducted the rent paid under the head lease of $1,250.00 for 26 years, namely $32,500.00, leaving approximately $248,533.76, from which would also have to be deducted trustees' commissions and expenses of administering the trust none of which appear in the evidence. (Record 128)

No further returns of rents had been received when the hearing was had in January, 1920.

Sub-leases of the Ookala leasehold property produced over and above all expenses $34,329.24 as shown on pages 134-136 of the Record, which statement to save reprinting is incorporated here by reference.

The evidence shows that in 1893 the trustees were given an estate from which they have received, as stated above, approximately $248,533.76 from the Mokuleia leasehold, and $34,329.24 net rents from the Ookala leasehold, in addition to $4,065.00 net proceeds of sale of the stock on the ranch at Mokuleia. Except the sum of $4,065.00 above mentioned, and the sum of $20,668.35, which the trustees were instructed by the Court below on appeal in this proceeding to set aside as the corpus of the Ookala leasehold, the only remaining asset of the estate if the decision be sustained will consist of the unexpired term of the Mokuleia lease or, as all of the land is subleased, the rents reserved in sub-leases of that leasehold, all of which will expire with the leasehold on May 1, 1934. If this method of administering the estate which has been

followed since 1893, that is, of paying all the net rents to the life tenants, be continued, an estate which has already yielded and enabled the trustees to pay to life tenants, the approximate sum of $262,194.65 and, if the annual rents for the remainder of the term amount to half of the rent produced during the year 1919, will yield and enable the trustee to pay to them the additional sum of $181,004.32, will be represented by the sum of $24,733.35, less certain counsel fees allowed in this proceeding and which have been paid out of corpus. As the trust is to continue until the death of the last survivor of the remaining six of James Gay's children, the youngest of whom in 1934 will be 45 and the eldest 56 years old, if they continue to live, the trustees must carry out the trust to support and maintain these six children, or such of them as shall be living, out of the income of the investment of less than $25,000.00, which if invested to yield six per cent per annum will produce less than $1500.00, from which must be deducted trustees' commissions, court and other expenses of administering the trust, leaving approximately $1200 per annum for support and maintenance of testator's children, in place of an average of over $10,000.00 a year which the trustees have paid over to the children.

We will examine the will, a copy of which was admitted in evidence (Record 13-16, 120), under which this conduct, it is contended by appellees, was authorized. After appointing the executors and trustees and directing them to pay his debts and funeral expenses, the testator said:

"I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said trustee or his successor to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said trust estate and all additions

or increase thereof, I direct my said trustee or his successor in said trust to convey the same unto the children of my said daughters, Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

* * *

"It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate created under this will, to sell and convey the said property at Mokuleia free and barred of the trust created by this will."

The will is in a very simple form; the property is given to the trustees upon trust to pay the income thereof to the widow for life and on her death to pay the income for the maintenance and support of the children during their lives, including the education of testator's daughters, and, on their death, to convey one-half of said trust estate and all additions or increase thereto to the children of testator's sons, and, as to the remaining portion of said trust estate and all additions

or increase thereof, to the children of testator's daughters.

It is impossible to imagine a simpler will involving a trust, about which trust no difficulty has arisen, and if the estate had consisted of a block of bonds no difficulty could have arisen because all that the widow would receive would be the income of the bonds, the children, maintenance, support and education out of that income, and at their death the bonds would go to the grandchildren.

Where the estate, as here, consists of leaseholds, or, also as here, sums of money representing the rents yielded by the leaseholds, does the difference in the nature or kind of the estate change the nature of the gift?

"Generally, a will is not to be construed by anything 'dehors', where there is no latent ambiguity, and parol evidence is not admissible to show the intention of testator against the construction on the face of the will, *and the state of his property cannot be resorted to, to explain the intention.*"

Heslop vs. Gatton, 71 Ill. 528.

See also:

Wentworth vs. Read, (Ill.) 46 N. E. 777;

McGough vs. Hughes, (R. I.) 30 Atl. 851;

Martin vs. Palmer, (Ky.) 234 S. W. 742, 743;

Parrott vs. Crosby, (Ky.) 201 S. W. 13;

Haupt vs. Michaels, (Tex.) 231 S. W. 706, 708-9;

Coffman vs. Coffman, (Va.) 109 S. E. 454, 457.

"Evidence of extrinsic circumstances, such as the testator's relation to persons, or the *amount and condi-*

tion of his estate, may be admitted to explain ambiguities of description in the will, *but never to control the construction or extent of devises thercin contained."*

Barber vs. Pittsburgh etc. Ry., 166 U. S. 83, 109.

If an estate instead of consisting of the sum of $1000.00± had consisted of an annuity of $100.00± per annum for ten years, would it be contended that if the income only of the estate were given the children for life and on their death the estate was to be given to testator's grandchildren, in the first case the children would receive only the income of the $1000.00, and in the second, the annual payments of $100.00 as received so that the grandchildren would receive nothing if the children survived the ten year period? The answer would be certainly not, as the estate only consisted of these ten annual payments which were finally given to the grandchildren, the intermediate income thereof only being paid to the children. Surely because these annual receipts consist of rents would afford no reason for treating them differently.

There is no dispute as to the meaning of the words of this will, and consequently no need to refer to any rules or other cases to determine testator's intention.

The law applicable to the case is fundamental:

First, that in the constuction of wills the intention of the testator as expressed in his will must prevail.

"And all rules and presumptions are subordinate to the intention of testator where that has been ascertained. *The intention will control any arbitrary rule, however ancient may be its origin."*

28 R. C. L. "Wills" sec. 173 at p. 214.

Second, where the intention is clear there is no room for rules of construction except that mentioned above.

Where the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction; where the maker of the instrument has clearly expressed one intention the court cannot impute another.

Rules of construction are only involved or applied to remove *doubts which the words of the instrument create.* This is the "raison d'etre" for their existence.

Here, until the property of the deceased was known, no question could have arisen. But the words of a will, the meaning of which is clear, cannot be changed nor can such meaning be altered by knowing what the property consists of; that is, the property of a testator cannot be looked to in order to change the meaning of the words, which is clear.

The testator made only two dispositions of his "estate" ("all my estate real personal or mixed") which means everything he had when he died, after payment of claims—debts, funeral and testamentary expenses. The first disposition is to his trustees in trust; and the second is to convey "said trust estate" with "all addition or increase thereto" (or thereof) to the testator's grandchildren on the death of all of the testator's children. What was the trust upon which the trustees were to hold the estate which terminated on the death of all of his children?

The will provides

"I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my

estate real personal or mixed and wheresoever situate in trust . . . . to pay the rents income issues and profits arising from and out of my said estate to my wife . . . . ." for life, "And from and after the death of my said wife I direct my said trustees . . . . . to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons . . . . and as to the other part thereof to pay the same for the support maintenance and education of my daughters . . . ."

Though there was no real estate, as the will speaks from the date of death in Hawaii, it was wide enough to include any real property which might subsequently be acquired by purchase, devise, inheritance or otherwise; and in using the words "rents, income, issues and profits" it is clear from the will that the word "rents" refers to the "real" property; that the word "income" refers to the "personal" property; and that the words "issues and profits" refer to the "mixed" property and the profits of the business. The Supreme Court of Hawaii sustained this contention and said

"Under these circumstances we cannot say that the word 'rents' refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will in the form he made it had he acquired any." (Record 58)

The life tenants contended in the courts below that as the will used the word "rents" in the connection "rents income issues and profits arising from and out of my estate" or "said trust estate" and the estate con-

sisted chiefly of rents, the rents themselves from the Ookala and Mokuleia leaseholds, (that is to say the "trust estate" itself,) were given to the testator's children. This contention however was not upheld. (Record 59-61)

Nor could it well be, if a leasehold is subleased at the same rental as that reserved by the lease, the leasehold has no value; if subleased at a higher rental the difference in the rentals determines the value of the leasehold, that is, what it is worth. The worth of the leasehold is its capital value. A bequest to trustees of an estate which included a leasehold, upon trust to pay the income of the estate to one for life and on his death to convey the estate to another, could not be carried out by paying to the first taker all of the rent received, because the rent is the "estate" not the "income" of the estate. And if the rents as received were paid to the first taker the whole of the estate would disappear if the first taker survived the term of the lease.

A reasonable interpretation must be given the will so that, where possible as here, all its provisions will harmonize and can be carried out, rather than an arbitrary interpretation which will defeat the purpose of the will.

The next disposition of the testator's estate was as follows:

"And from and after the death of all my children . . . . . I direct my said trustee . . . . . to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons. . . .

And as to the remaining portion of said trust estate and all additions or increase thereof, I direct my said trustee . . . to convey the same unto the children of my daughters . . . "

Are the words by which the testator gave devised and bequeathed his estate, real personal and mixed to his trustees upon trust more potent to transfer to the trustees what he possessed than a conveyance by the trustees of the said *trust estate* to transfer the same property to the grandchildren in execution of a trust to convey? Is there any reason for construing the words "all my estate" in the bequest to the trustees as including more than the words "my said trust estate" with all additions or increase thereof in the ultimate trust to convey to the grandchildren?

If the ultimate trust stood alone and there was merely a bequest to the trustees upon trust to convey "my said trust estate to my grandchildren" on the happening of a future event, could it be questioned that the whole estate would go to the grandchildren?

What words in the will can be found that say that the trustees shall convey to the grandchildren less than the estate given to the trustees themselves?

The will provides:

"It is my wish and I hereby direct that my said trustees * * * shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them * * * at any time when in their discretion they think that a sale of all the property at said Mokuleia, would

by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate created under this will, to sell and convey the said property at Mokuleia * * * "

The Court below in its decision states:

"Their (life tenants) main argument is based upon that portion of the will which directs the trustees to carry on the business of ranching at Mokuleia so long as it can be done profitably and without loss and invests them with a discretionary power to sell the property at Mokuleia. As applied to the Mokuleia lease we think their reasoning sound. If the conversion was required at all it must take place as soon after testator's death as may be. The direction to the trustees to 'manage, conduct and carry on the business of ranching and stock raising at Mokuleia' and the discretion with which the testator invested the trustees in the matter of selling 'the property at said Mokuleia' are both inconsistent with the intention that the property was to be converted, for if they had the right to retain the property until 'in their discretion they think that a sale of all of the property at Mokuleia would by reinvestment of the money realized from such sale of such property be beneficial and inure to the benefit of or increase the trust estate created under the will', they may retain it for years or, indeed, may never convert it at all, and if so, they are only exercising the discretion given to them by the will." (Record 61-62).

Their conclusion then was:

"If, as we have concluded, the trustees were author-

ized under the terms of the will to retain the head lease, whatever sums they received for its use were income and the life tenants entitled to receive it." (Record 62).

The Court below, therefore, held that if a testator gives a power of sale to trustees of a leasehold to be exercised when in their discretion they think a sale would be beneficial and inure to the *benefit of or increase the trust estate,* the trustees need not exercise the power and "whatever sums they received for its use (meaning the whole of the rents) were income and the life tenants entitled to receive it," "indeed may never convert it at all" even if in their discretion they think a sale would be beneficial and inure to the benefit of the estate? The cases are all one way and clear that "where the power to postpone conversion is (as here) for the purpose of selling the property to the best advantage and there is no indication that the power is inserted for the benefit of the tenant for life as against the remaindermen, the rule in Howe v. Dartmouth applies. Brown v. Gellatley, L. R. 2 Ch. [1866-7] 751 at page 757; Furness vs. Cruikshank (N. Y.) 130 N. E. 625 at pages 626, 627. (Cited below: decided 1921.) How a discretionary power of sale to benefit an estate can be resolved into a power to put that estate out of existence is, of course, not explained by the decision.

Did the testator intend, by giving the trustees the power at any time to sell when in their discretion a sale would be beneficial to and inure to the benefit of or increase the trust estate, that, by making the time

when they were to sell *discretionary,* they were to have power to dissipate the trust estate in the meantime, and that if they did not decide to sell at all (because such a course would be more advantageous to the trust estate?) they need not account for any of the trust estate to the grandchildren? The reason for making the power discretionary is so that it can be exercised or not, as it will or will not benefit the trust estate.

In Furniss vs. Cruikshank (N. Y.) 130 N. E. 625, (decided 1921 and not cited to our Supreme Court at the time, in 1921, it decided the Mokuleia question, but cited with approval by that Court in its opinion dated February 28, 1922, Record, 78), testator created a trust fund for his daughter for life. The estate consisted of personal property, productive real estate, and unproductive real estate. Between 1885 and 1902 the unproductive real estate was sold for $356,760.89 net, which was regarded as capital. The daughter claimed that $164,474.36 thereof should be regarded as income. The will contained this provision:

"I hereby declare that all the powers herein given are intended to be *discretionary* and to be exercised or not as said executors or trustees should deem proper * *."

The Court said, p. 627:

"We reach the conclusion that the intention of testator as derived from the will was to effect an equitable conversion of his real estate—*not to leave it to his trustees to determine in their discretion whether or not a sale should ever be had* * * *"

On p. 626 the Court said:

"* * * and if the testator directs the trustees to sell only if and when they think it wise * * * in such case there is a clear declaration that what the testator has in mind is to benefit the principal of his estate."

In Brown vs. Gellatly, L. R. 2 Ch. (1866-7) 751, testator was engaged in the shipping business and empowered his trustees to sail the ships for the purpose of making profit. At page 757 it says:

"But in giving that power he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder * * * *but says that it is to be exercised for the benefit of the estate."*

The decision of the court below itself wholly ignores the intention of the testator as expressed by the words of his will. If it be sustained then (1) the estate given to the trustees upon trust cannot be conveyed by them to the grandchildren as the will provides; (2) the bulk of the estate or corpus—the rents derived from the sub-leases—will be given to the persons entitled only to receive the income thereof; (3) the direction to carry on the business will entitle the first takers to receive the capital as profits; and (4) the power to sell all the property at Mokuleia when they think a sale would by reinvestment of the money realized from such sale be beneficial and inure to the *benefit of* or *increase* the trust estate created under this will (the benefit of or increasing the trust estate being almost the last thought in the testator's mind when he made his will) can be postponed or never exercised with the result that effect will not be given testator's intention at all.

Suppose a co-partnership or corporation held a lease as part of its assets when it commenced business and that the leasehold was sublet at profitable rentals. The co-partnership or corporation could not pay out all the rentals they received as "profits" of the business or dividends, because the leasehold would represent a capital asset and they would be obliged to create a reserve fund to represent the lease when it ultimately expired.

Our contention is that the intention of the will is clear that all the life tenants were to receive was the profits of the business, conducted of course as a business should be, while the business was carried on, and the income of the estate, of the nature of profits, during their lives, and that on their death the trust estate given to the trustees, though not necessarily in the same form, should be conveyed by them to the grandchildren.

Does the provision of the will referred to mean that the Mokuleia leasehold should disappear from the estate if it was not sold? Can the provision have this effect when Testator speaks of a *re*investment which might be *beneficial* and inure to the benefit of or *increase the trust estate*. When a testator speaks of increasing and benefiting his estate, how can the trustees justify a course of conduct by which it is to be lost?

The only alternative course to selling the leasehold is to keep it until it expires. If keeping it means (as the Court below held in effect) it is to be a total loss to the trust estate, i. e. to the corpus, then there can be

no question but that an immediate sale would be beneficial to the trust *estate,* and the refusal of the trustees to sell would be arbitrary. It is too obvious to argue that the testator did not mean a total loss should follow an exercise of the trustees' discretion not to sell. The will shows that the testator meant his trustees should preserve his estate from loss whether they sold or not. There are no grounds stated by the Court below for holding that the trustees were justified in paying to the life tenants all the rents from the Mokuleia leasehold; except that the discretionary power to sell showed the trustees were not obliged to convert and therefore the rents of the leaseholds belonged to the tenants for life.

Actual conversion must be clearly distinguished from an *equitable* conversion. The Courts below failed to grasp the difference. Actual conversion as its name denotes is where there is an actual change of the property into some other property of a different nature. Equitable conversion is where there has in fact been no sale, but the court considers that as done which ought to have been done. The cases are unanimous in holding that this rule of equitable conversion is applied not from any expressed intention of the testator that there must be a sale, but simply as a means (the cases say "as a convenient means") of adjusting (calculating) the equities (how much each is entitled to) between life tenants and remaindermen.

We have said that the intention of the Testator can be ascertained from the words of the Will without applying rules of construction, and that all that was

given under the will to the wife and children did not amount to more than the rents, income, issues and profits of the estate, these words being all used in this will in the sense of profits or income as distinguished from capital, and not the actual receipts in the case of wasting assets; and this we submit is clearly shown by the direction to manage, conduct and carry on Testator's business so long as it can be done *profitably*. But in addition we have in support of appellants' case the broad legal principle that "where residuary personal estate is settled by will for the benefit of persons in succession, all parts of it as are of a wasting or future or reversionary nature or consist of unauthorized securities must be converted or treated as converted into property of a permanent and income-bearing character unless the will otherwise directs."

Such a principle is implicit in all such wills. It would be impossible otherwise for a trustee to carry out the words of such a will to convey the estate to the remaindermen on the death of a life tenant if he retained wasting property and paid the proceeds—the capital—to the life tenant.

If, however, a testator really intends that the life tenant shall receive these proceeds and that the remaindermen shall only take what is left when the life tenant dies, this intention is regarded, but this intention must either appear or be inferred from the contents of the will.

The case presented by the appellees in the Court below called for the construction of "rents income issues and profits", as meaning the actual receipts of or from

the leaseholds, and contended that the legal principle mentioned above did not apply as the will contains an intention that the life tenants shall receive them at whatever cost apparently to the estate. There is not one word that does so: nothing that throws a doubt upon the clear intention to preserve the trust estate.

The contention of the appellees was that the rule of equitable conversion as laid down in Howe v. Dartmouth and which it is admitted, if applicable, is conclusive of the case, is not applicable here and that the case comes under one or other of the exceptions to that rule.

The rule in Howe v. Dartmouth (1802) 7 Ves. 137, has been stated as follows:

"In the absence of anything to the contrary in the will the donee of a life or other limited interest in the the income of the residue of a testator's personal estate is, in so far as such estate consists of wasting or reversionary interests or unauthorised securities, entitled not to the actual income of such interests but to the income which such interests would produce if they were at the Testator's death sold and the proceeds invested in trust securities."

The facts in that case were:

Testator left all his personal and real estate to his wife for life and then to his sister for life, with absolute gifts over. The personal estate consisted, among other things, of annuities. It was held among other things that the annuities being wasting securities, as between the life tenants and the remaindermen, they must be *treated* as sold from the time the executors

should have sold them; "as between the lifetenants and the remaindermen they must be *treated* as sold", not that they must be actually sold but only treated as sold for the purpose of adjusting the respective rights of the parties. And this rule applies even when the sale is properly postponed under a power to do so. In re Chaytor, Chaytor v. Horn, 1 Ch. 233.

The rule is based upon an implied or presumed intention of the Testator and not upon any intention actually expressed by him, and its purpose is to carry out the principle of the law that the trustee must act impartially between the beneficiaries.

As the rule is stated above it applies only in the absence of anything to the contrary. And what the English Courts have decided will be deemed to the contrary have been classed as follows:

(a) Where the Testator has indicated an intention that the wasting property should be enjoyed in specie;

(b) Where the will contains a direction or implication contrary to the rule;

(c) Where the will confers on the trustee a discretion to postpone such conversion which he bona fide and impartially exercises and such discretion is *not* given to be exercised for the benefit of the estate.

(See Furniss v. Cruikshank (N. Y.) 130 N. E. 625 and Ott v. Tawkesbury, 75 N. J. Eq. 4, where the cases are collected and discussed, but where the Court nevertheless held, although the will in each case contained a discretionary power of sale, that the rule of equitable conversion applied and the corpus must be maintained.)

We will deal with these exceptions separately:

(a) Where the Testator has indicated an intention that the wasting property should be enjoyed in specie.

The case does not come under this head.

Testator, having given all of his estate to his trustees upon the trusts of his will, directs that his Trustees shall manage, conduct and carry on the business of ranching and stock raising "so long as it can be done so *profitably* and without loss". Surely a gift of property to trustees with a direction to carry on Testator's business therewith, followed by a power to sell for the benefit of the estate, is repugnant to an intention that the property should be enjoyed by life tenants in specie. The trustees could not carry on the business with the life tenants in possession.

Underwood v. Underwood (Ala.), 50 So. 305.

Armingan v. Reitz (Md.) 46 Atl. 990.

Kinmonth v. Brigham "infra."

(b) Where the Will contains a direction or implication to the contrary.

A contrary direction or implication is shown where the will contains an express *general* power (*without stating any object or purpose for which it is given*) to the trustees to retain any portion of the estate in the same state in which it should be at testator's death, or any indication showing an intention to favor the life tenants as against the remaindermen. There is no *express* power in this will given to the trustees to retain any portion of the estate in the condition it was in at Testator's death. For the purpose of carrying out the direction to carry on the business and of choosing the

best time to sell, after the trustees cease to carry on the business because they cannot do so profitably, they must retain it, *but for no other purpose.*

But where is there any intention in the Gay will to prefer the life tenants at the expense of the estate? The property is retained for two express purposes (1) to enable the trustees to carry on the testator's business so long as this can be done profitably and (2) for the purpose of selling the property to the best advantage: "when in their discretion they think that a sale of all of the property would by a reinvestment of the money realised from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate".

(c) Where the Will confers on the trustee a discretion to postpone such conversion which he bona fide and impartially exercises and such discretion is not given to be exercised for the benefit of the estate.

There is here no expres power or direction to postpone conversion: Appellees' contention, and it was adopted by the Court, was that it is implied from the power to sell, but this power of sale following immediately the direction to carry on the business so long as it can be done profitably, and which must be exercised when they considered a sale would be beneficial and inure to the benefit of the Trust Estate, shows completely that the discretion to postpone the conversion was only and wholly for the purpose of being "beneficial and inure to the benefit of or increase the Trust estate created under this Will". It is the benefit of the trust estate and not the favoring of the life tenants at

the expense of the remaindermen that the trustee had to consider.

It is clear that when the testator bequeaths his estate real, personal and mixed to trustees (not to the life tenants) upon trust and his estate is to be increased during the period of the trust, and says expressly that his trustees shall convert when it will benefit his estate, that the estate with all additions or increase thereof shall be conveyed to the grandchildren, and that the income is to support and maintain the children, the testator surely does not intend to favor the first takers at the expense of the grandchildren, and by giving his trustees a discretion to sell when such sale would benefit his estate, he does not intend such discretion to interfere with the way his property is disposed of. If the exercise of the trustees' discretion is to benefit anybody or anything the testator says it shall benefit his *trust estate*.

In the Courts below the life tenants argued that the rule of construction that a testator intends to favor his wife and children in preference to other objects of his bounty, should be applied. The meaning of the will is clear on this point also; the will says:

"And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying."

Testator does not say the share of income formerly belonging to one of his deceased children shall be divided among his surviving children. Here is a clear

expression of an intention not to favor the children in preference to other objects of his bounty.

Modern American decisions, while taking note of ancient English Rules, have been very cautious in applying them and have repeatedly held that the test, of whether they are applicable or not, depends upon whether they would give a fair interpretation of the will in each case, and the Court below actually said:

"When once you have arrived at the intention of the testator you must give effect to it notwithstanding the rule in Howe v. Earl of Dartmouth. Any other conclusion would be in conflict with our own decisions. Mercer v. Kirkpatrick, 22 Haw. 644; Fitchie v. Brown, 18 Haw. 52; Rooke v. Queen's Hospital, 12 Haw. 375."

Record 56-57.

And the intention of this will containing a discretion to carry on a business profitably given to trustees followed immediately by an express power of sale when in their discretion they think a sale would be beneficial and inure to the benefit of the estate, was (the court below decided) that the trustees might "never convert the property at all and whatever sums they received for the use of the head lease (meaning the rents) were income and the life tenants entitled to receive it", whatever the consequences to the estate which the testator was so solicitous about benefiting.

"It is of course a rule to which there can be no dissent that, in construing a will the dominant intention of the testator, as manifest in his will, must if lawful,

be given effect; *but the intention which controls is that which is positive and direct, not that which is merely negative or inferential."* (Bill vs. Payne, 62 Conn. 140, 25 Atl. 345).

"It is only where the terms of the will are ambiguous, and the intention left in doubt, that a resort may be had to adventitious circumstances to determine that intention. Such circumstances can never be invoked to create an ambiguity. . . . *The duty of the Court is ended when it has determined* by the well settled rules of interpretation *what the testator* ACTUALLY *intended by the language which he has used.* If that intention is valid, it must be carried out."

Peck vs. Peck (Wash.) 137 Pac. 137, 139.

See also:

Clow vs. Hosier, 258 Fed. 278;

Estate of Grannis, 142 Cal. 1, 6;

Wilson vs. Linder, (Idaho) 110 Pac. 274, 276.

In re McDougall (N. Y.) 35 N. E. 961. Testator gave "all the rest, residue, and remainder of my estate, both real and personal" to his wife "to be used and enjoyed by her during the term of her natural life" or widowhood, and then to be divided equally between his mother and brother. The estate was converted into cash and realized $6000.00 net, and the widow claimed possession of the fund. The Court said:

"Because the testator says that he leaves the 'rest and residue' of his estate to his wife 'to be used and enjoyed' by her during her life or widowhood, such expression, in the opinion of the Courts below necessarily requires that she shall have the possession of the

legacy so as to use and enjoy it. On the contrary, we think the testator meant to give the widow nothing but an estate for her life or widowhood, terminable at the happening of either event, and that the remaindermen were entitled to receive at such time the whole corpus of the estate.—By the use of the language which follows the expression, the intention of the testator is made manifest, and the widow thereby takes but an estate terminable at her death or remarriage, and without power to expend any portion of the corpus for any purpose whatever."

Miller v. Williamson 5 Md. 219 at 235 referring with approval to Evans v. Inglehart (Md.) 6 Gill & Johns 196 said:

"Speaking of the duties of the executor, the Court says: 'If the surplus or residue thus bequeathed consists of *money* or property, *whose use is the conversion into money,* and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money, for the benefit of the estate; as for example, a quantity of merchandise, a crop of tobacco, or the like, an investment thereof must be made by the executor, in some safe and productive fund,—so as to secure the dividends, interest or income, to the legatee for life, and the principal after his death to the legatee in remainder.' "

(The italics are not ours but are in the report of the case.)

In Hawthorn v. Beckwith (Va.) 17 S. E. 241 at 243:

"But in regard to money—the rule is different. In that case the legatee for life is not entitled to the possession of the corpus, but only to the profits, and it is the duty of the executor to invest the fund, and hold it in trust until the termination of the life estate—'I take it', said Chief Justice Shaw in Field v. Hitchcock, 17 Pick 182, 'that nothing is now better settled than that such a gift of the interest only, and if no trustee is specifically named, it is the duty of the executor to invest the money and pay the interest only to the person entitled for life, and preserve the principal for him who is entitled to take afterwards'—So that, in electing to take the fund in the present case, as the life tenants did, they took it, not as trustees, but as borrowers."

The Court below relied upon the case of Kinmonth vs. Brigham (Mass.) 5 Allen 270 (record 77-78) in apportioning the Ookala rents between capital and income. That case involved the point on which the Supreme Court decided against appellants, as to the Mokuleia leasehold as indicated above. It discusses the English rules of construction above mentioned and in effect declines to follow them to this extent—the will gave the trustees a *discretion* to convert an unauthorized investment, the Court held this was not sufficient indication of intention to entitle the life tenant to enjoy the investment "in specie" or to receive as income all it produced if the trustees elected not to convert.

In that case the will gave the residue of testator's estate to trustees in trust to pay the income as therein provided with remainder over. Testator died Febru-

ary 22, 1860; a part of his estate was his interest in a limited partnership formed September 4, 1858, to continue for four years, to which he had contributed $50,000.00 and from which he was entitled to half the profits semi-annually. It was provided in the partnership agreement that in case of the death of either of the general partners within two years, the partnership should continue to the time of the next semi-annual accounting and the testator and his representatives should then have the right to take the property and business.

The will contained this provision to which we call the Court's particular attention:

"Eighth. And whereas by the latter part of the eleventh article of the contract between myself and partners, provision is made for the death of either of the general partners; now, in such event, my direction is, that my executors shall not avail themselves of that provision, unless they see fit."

The trustees did not avail themselves of the right to convert the investment in the partnership at testator's death but allowed the same to continue until the partnership expired Sepember 4, 1862. They received in that time $108,558.44 in profits as well as the return of the $50,000.00 invested capital. The life tenant claimed that the sum of $108,558.44 was income. The Court said, p. 276:

"The English rule is perfectly well settled that where the residue of personal property is left without specific description, and is given in succession to a tenant for life and remainderman, it shall be invested

in a permanent fund, so that the successive takers shall enjoy it in the same condition, and with the same productive capacity. The reason for the rule is the obvious and just consideration, that the intention of the testator is expressly declared to give the enjoyment of the same fund to these successive takers; and that this can only be done by fixing the value of the fund at the time when the right of the first taker to its use commences. The leading case is Howe vs. Dartmouth, 7 Ves. 137. This was followed by Ferns vs. Young, 9 Ves. 549, where the doctrine was applied to the case of money invested in a partnership at the death of testator. Many of the subsequent cases are collected and reviewed in 2 White & Tudor's, Lead. Cas. in Equity (Amer. Ed.) 278 et seq., and in the Notes to Howe vs. Dartmouth; and these with others have been carefully presented in the argument to this cause.

"In the application of this rule, the English courts of chancery, by a long course of decisions, have determined that an investment in the three per cents. is to be generally regarded as the only investment which will be sanctioned or directed by the Court as safe and prudent; though, in a few cases, a reference has been made to a Master to find whether an existing security at a higher rate of interest is not absolutely safe and more beneficial to all parties. Caldecott vs. Caldecott, 1 Y & Coll. 312, 737.

"But where property is specifically bequeathed, or where the intention can be gathered from the whole will that it should be enjoyed 'in specie' the rule does not apply.

"And the rule itself, so far as it requires an investment in public securities has never been adopted in this commonwealth. As was said by Chief Justice Shaw in Lovell vs. Minot, 20 Pick. 119 'There are no public securities in this country which would answer these requisites of an English court of equity'. The only rule which has been recognized by this court as obligatory upon a trustee in making investments is, that he shall act with good faith, and in the exercise of a sound discretion.

* * *

"But although in this commonwealth there are no investments regarded as so absolutely secure as to make a choice of them obligatory upon trustees and in all cases considerable latitude has been allowed, *yet it has never been held that trustees for successive takers were at liberty to disregard the security of the capital in order to increase the income.* Nor where property is of a wasting nature is an investment in it consistent with their duty, in the absence of specific directions in the creation of the trust. They are equally bound to preserve the capital of the fund for the benefit of remainderman and to secure the usual rate of income upon safe investments for the tenants for life; and to use a sound discretion in reference to each of these objects. If there is no specific direction and they are charged merely with a general duty to invest they cannot postpone the yielding of income for the increase of capital nor select a wasting or hazardous investment for the sake of greater present profit. *And the rule is the same in regard to property which comes to the*

trustees from the testator and not specifically bequeathed, as it is in regard to making new investments. If the investment is not such as this Court would sustain them in making, it should not be allowed to continue but should be converted. *Its value as a fund should be ascertained* as of a time when the enjoyment of the income of it is to commence; *and the fund treated as if it had been at that time converted into such an investment* as the Court would sanction. In determining this value it is not always practical to settle it with exactness, until the conversion is actually made; especially in cases where the capital is more or less at risk. The most just rule seems to be where reasonable care and prudence have been used by the trustees in making the conversion, *to treat the whole sums received from time to time, until converted, as parts of the estate;* and to find what sum at the time to which the conversion has reference would be equivalent to the amount actually received, at the time it was received; and to treat that sum as capital and the remainder as income. . . . . If the property were embarked in a commercial adventure, or were in the shape of a bottomry bond, or other hazardous condition, the trustees would be required to use suitable skill and caution in collecting whatever could be obtained from it, and the value of whatever was or ought to have been realized from it would be fixed as of the time of the testator's death, and treated as capital. And on the other hand, where the property is of a wasting nature, as terminable annuities, *leases,* or the like, the value of the whole investment at the testator's death should be

ascertained, and what should be computed as income be computed on that basis.

"In applying the principles which we have stated to the case at bar . . . . . *we are of opinion that there is nothing in the will which indicates an intention that she should enjoy the income of any particular property which the testator possessed 'in specie', but the whole residue was to be alike subject to investment by the trustees. The reference to the special partnership is only in connection with instructions to the executors as to their duty in a special contingency.*"

Kinmonth v. Brigham "supra"

"In re Hart's Estate 203 Pa. 480, 53 Atl. 364, the power was to invest in such securities *'as may in their judgment be best'*. In speaking of this broad power conferred upon the trustee, the Court said: 'His obvious duty was to preserve the principal by reasonably safe investments, and to pay such income as was earned from such investments to those entitled thereto. He was not to increase the income by any sort of supposed largely remunerative investments which might endanger the principal'".

Pabst vs. Goodrich, (Wis.) 113 N. W. 398, 407.

In *Ott v. Tawkesbury* 75 N. J. Eq. 4 the cases are fully discussed. The will after creating a trust provided:

"Sixth. I desire that my wife shall out of my personal estate make such gifts to my friends Howard W. Hayes, my long and faithful partner, Simon S. Ott, my uncle Col. A. S. Johnson and his wife, L. A. John-

son, (which I suggest in their case shall be money) as they may desire and my executors may approve.

"Seventh: I authorize my executors to sell and dispose of any or all of my personal property at public or private sale *at their discretion* and to invest the proceeds thereof whenever in their judgment such course shall be necessary or advisable for the carrying out of any of the provisions of this will. I also empower them to sell and dispose of any or all of my real estate at public or private sale at their discretion."

After stating the general rule of Howe v. Dartmouth, the Court said:

"It is claimed on behalf of the life tenant that the tendency of the Courts, as shown by the later cases, has been to allow small indications of intention as sufficient to prevent the application of the rule". (Cities authority) "But in a still later case Macdonald v. Irvine (1877) 8 Ch. Div. 101 where the general rule and the effect of these cases was considered, it was concluded by the Court of appeal that it was altogether a question of a fair and reasonable construction of the will. . . . This is the principle to be applied here and the test being, as I think it should be, whether the will, fairly construed, indicates such an intention that the property in question is specifically bequeathed and to be enjoyed 'in specie' . . . None of the personal property is expressly bequeathed to the life tenant by description or 'in specie', and it is claimed that the direction in the sixth clause that his wife shall out of his personal estate make gifts to his two executors and others (preferably

money to these two) is a specific gift by implication, because it necessarily contemplates the possession of the personal property by the wife in order that she may make the gifts." The Court held with reason that was not the intention of the will and said: "For it must be further observed as bearing on the question of the testator's intention that the property is to be enjoyed by the widow 'in specie', and not be converted, that we have in this will a case in which the general rule as to the testator's intention of conversion, derived from the formal terms of the bequest itself, is fortified by other clauses indicating specially an intention that the executors shall convert all of the estate and hold the proceeds, and that pending the conversion, the tenant for life shall not enjoy the possession of the property 'in specie', as it existed at testator's death. These clauses are those which expressly authorize the sale of any or all of the personal property at public or private sale, and the investment of the proceeds, to carry out the provisions of the will, the express authority to sell the real estate, and the express direction that the management of the real estate in which Mr. Ott is interested with him shall continue with him, thus excluding the tenant for life from any enjoyment 'in specie' of these lands or of their proceeds of sale. These are express special indications appearing by the will that after the payment of debts and the delivery to the widow of the four gifts selected by her and approved by the executors, it is the testator's intention that the whole estate, real and personal, shall be converted by the executors and invested by

them for the purpose of paying the income to the wife. Confirming as they do, the application of the general rule as to conversion, which arises from the form of the bequest itself (a general bequest to persons taking in succession the same property), I must hold that the tenant for life is not entitled to demand of the executors the payment of the principal fund."

The construction asked for by the life tenants and the trustees would, in this case, if adopted, not only deprive the grandchildren of the estate bequeathed to them, but would also make it impossible for the trustees to carry out the trust for the maintenance and support of the life tenants after the lease expired.

None of the cases relied on by Appellees in the court below help to explain what the trustees would do if the consequences which they contend arise from a discretionary power of sale, viz., a right on the part of the trustees to retain investments and a right on the part of the life tenants to receive all of the proceeds of the property, resulted in the trustees being unable after 1934 to provide support and maintenance for the children which surely was one of the main objects of the creation of the trust and was to last as long as any of them lived. The appellees contend that there is a *presumed* intention in this will which may defeat not only the definite gift of the trust estate with all additions or increase to the testator's grandchildren, but also the definite gift of maintenance and support to the testator's own children during their lives.

METHOD OF DETERMINING CORPUS

The courts below held that $20,668.35 was the corpus or capital value of the Ookala leasehold to be set aside by the trustees out of the net rents amounting to $34,329.34, and said:

"In order to arrive at that value each installment of rent received by the trustees from said leasehold was considered to be part income and part capital. To determine what portion of each installment of rent constituted capital calculations were made by the actuary to ascertain what sum put out at six per cent. interest with annual rests on the date of testator's death would amount to each installment actually received at the time it was received. Each installment was figured separately and the sum of amounts thus ascertained equals the value found by the circuit judge." (Record 75.)

We contended in the court below (Record 75-76) and contend here that four courses were open to the trustees at the beginning of the trust, as follows:

1st. The trustees could have valued the leasehold at the inception of the trust and paid to testator's children maintenance and support out of an amount equal to six per cent (6%) of such value; or

2nd. They could have sold the leasehold, invested the proceeds and supported and maintained testator's children out of the income thereof; or.

3rd. They could have invested the rents as received and supported and maintained testator's children out of the income therefrom; or

4th. They might (by analogy to a direct gift of money for life) have paid the rents as received to testator's children upon receiving reasonable security to preserve the fund for his grandchildren.

What the trustees did was to pay over the rents to the children to use as they thought fit, so that the mehod that they adoped was the fourth, except that the trustees gave testator's children the unrestricted use of the money without any security, which neglect to take security was a concession to testator's children of which they cannot complain.

AUTHORITY FOR THE FIRST METHOD INDICATED

"It follows that as to property, which at the testator's death is invested upon permanent government or even real securities, the legatee for life is entitled to the actual income . . .

"But as to property which has a temporary duration only, as leaseholds or annuities for lives or years, the actual income of which, it is obvious, partakes to some extent of the nature of capital, the same rule could not be justly applied, as it would evidently have the effect of conferring an undue advantage on the person entitled for life, at the expense of the ulterior taker.

"The fair course, and at the present day the settled rule, in such cases, seems to be to carry to account, as capital, the income accruing from the time of the testator's decease; and in lieu of such income, to pay to the legatee for life from that period, a sum equal

to the dividends which the produce of the sale would have yielded if invested. . . ."

1 Jarman on Wills (5th Ed.) p. 619 bottom numbers.

"Where the property is of a wasting nature as terminable annuities, leases or the likes the value of the whole investment at the testator's death should be ascertained and what should be regarded as income be computed on that basis."

Kinmonth vs. Brigham, "supra".

The value of a lease at testator's death is ascertained not for determining the amount of the corpus, but for determining what amount of income shall be paid to the life tenants.

In the Kinmonth case the Court held that even the *profits* after testator's death were not to be treated exclusively as *income*.

In our case, the life tenants compare the Ookala "rents" to the "profits" in the Kinmonth case. The comparison is improper because the "rents" represent the "capital", to wit:— the lease itself, and should be compared to the $50,000.00 invested capital in the Kinmonth case.

In these cases the problem is what should the life tenants receive. Courts are usually concerned about the estate. The property belongs to the remaindermen, subject to the right of the life tenants to receive the income. If the property had been sold at the time of the testator's death for the value put upon it as of that date, all the testator's children would have been entitled to would be maintenance and support

(including education of the daughters) out of the income of the proceeds.

AUTHORITY FOR THE SECOND METHOD INDICATED

"The case of Mills v. Mills (7 Sim. 501) falls within the present sub-division of our subject. There the Testator devised and bequeathed all his real and personal estate to trustees in trust to pay *the proceeds* to his daughter for life, and after her death to her children, and in default of children, over. Part of the Testator's personal estate consisted of leaseholds . . . Sir L. Shadwell, V. C., . . . held that the leaseholds . . . should be sold . . . His Honor further held that the tenant for life must refund what she had received, more than she would have received if the leaseholds and the stock had been sold, and the proceeds invested in the three 'per cents.' "

2 Roper on Legacies (2nd Am. Ed.) 1329.

AUTHORITY FOR THE THIRD METHOD INDICATED

In Crawley v. Crawley, 7 Sim. 427, 58, Eng. Reports 901, it was held where an annuity for a term of years forms part of the residue, the executors, until they can sell it, must invest the payments, and the interest of the investments belongs to the tenant for life of the residue.

In Tucker vs. Boswell, 5 Beav. 607; 49 Eng. Rep. 713; £200 (that is, the difference between £400 and

£200) per annum income of the estate given to testator's widow if she should regain sanity, was held, on her not regaining sanity, to be corpus and not income for the tenant for life of the residuary estate.

AUTHORITY FOR THE FOURTH METHOD INDICATED

"It has often been held that money may be the subject of an executory devise, but where the use of money is given by will to a person for life, and then over, such person is entitled only to the interest on such money, and not to the principal sum. A sum of money devised to one for life, with remainder to another, may be of great use to the first taker; he may put it to interest or invest it in goods or land, and thus make a profit. All that is required is that on his death his executors pay the principal to the remaindermen. Money has this peculiar advantage over other chattels, that the use of it occasions neither loss nor injury, and from time it suffers no decay. The executors of the first taker are not bound to pay over the identical pieces of metal which their testator received, but the like value in lawful money of the county. So the rents and profits as well as the estate itself may be given by way of executionary devise."

11 R. C. L. page 474, sec. 11.

"If a fund is handed over to the tenant for life instead of paying him the income therefrom, he may invest the fund, and the profits from such investment become his exclusive property, the remaindermen being entitled only to a return of the original

sum. He may use the fund and make all the profit on it he can with due regard to its safety and protection."

21 C. J. 1041 sec. 246.

"The executor or trustee may, instead of selling the property, intrust it to the life tenant upon his giving adequate security for the preservation thereof, in such cases as security is necessary . . . and a tenant for life who is willing to give adequate security may demand possession of the property instead of having it sold. One to whom the net estate of a decedent has been bequeathed for life is entitled to the possession and control and management of the *estate, consisting of money* upon giving proper and adequate security."

21 C. J. 1040.

The trustees contend that they paid the rents "in toto" to testator's children *as income.*

The law wisely presumes that persons intend the consequences of their acts.

Therefore, the trustees by paying the rents to the life tenants *elected by their conduct* which course to follow at the begnning of the trust. Life tenants were parties to and acquiesced in the course adopted. The trustees must be presumed to have known what their duties were and acted accordingly. If they did not know, the Courts were open to them then as they were when they filed their bill for instructions. Where their conduct is capable of a construction favorable to the terms of the will and to their powers and duties, that construction must be attributed to it. When tes-

tator's children have taken the advantages of the use of the money, it being much more favorable than the limited returns a trustee can get by investing it, they cannot say after they have enjoyed all of the advantages of their conduct, that another course would be more advantageous to them today. They and the trustees are estopped by their conduct.

Let us summarize the above:

1. The law says that you may give the tenants for life the use of the corpus, instead of investing it and paying them the income;

2. The trustees did give the testator's children the use of the corpus;

3. But the trustees and the children say that they thought it was income that belonged to the testator's children.

The answer is: "Ignorania legis non excusat."

Election is the right to choose between different courses. It is based upon the rule that a party cannot in his dealings occupy inconsistent positions. For instance, where a man rescinds a contract, the law does not permit him later to make use of the contract as subsisting for the purpose of claiming damages, or for the purpose of recovery thereon.

In Clausen v. Head, 110 Wis. 405, 411, it is said:

"The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applies only where action in the first instance was taken in *ignorance of the facts.* * * * Where knowledge of the *fact*

exists, intent is conclusively presumed as a matter of law; and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time."

All of the facts of the case were as well known to the parties when they adopted the course they followed as they are today.

Our contentions as to the method of determining the corpus of the rents apply to the Mokuleia rents equally with the Ookala rents.

SOME OF LIFE TENANTS' CONTENTIONS.

As we may not have an opportunity of replying to their brief, we wish to deal now with two contentions that it has been suggested life tenants will make:

First: That the Supreme Court erred in holding that the rents or part of them from the Ookala leasehold were corpus; and

Second: That this appeal does not bring up for review the first decision of the Supreme Court that no part of the Mokuleia rents are corpus.

As to the first contention—the appellees did not appeal from the decree of the Supreme Court and have not taken any appeals at all in the case.

"We think it is elementary that where a party to a suit does not appeal from the decree entered therein he must be held to acquiesce in it and cannot be permitted to ride into an appellate court upon the appeal of some other party to the suit."

Castle vs. Irwin, 25 Haw. 786, 788.

"We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

Fitchie vs. Brown (Hawaii) 211 U. S. 321, 329.

As to the grounds for the life tenants' first contention, they seem to be these:

(a) That the use of the words "rents income issued and profits" in the will meant the "rents" of the leaseholds. We have sufficiently discussed that question above.

(b) The testator made his will three days before he died, at a time when he was sick and knew he was dying, and that he knew then he had no real estate and made his will with the intention that it should apply to the leaseholds and personal property only.

The evidence that the testator knew he was dying when he made his will was given at the hearing of the accounting in the Circuit Court after the first appeal had been decided, over the appellants' objections on the grounds that such evidence was outside of the scope of the hearing on the accounting and that it was incompetent, irrevelant and immaterial (Record 137-140, 145-146.) Such evidence if competent would tend to alter the intention expressed in the will. The Circuit Judge, in his decision, held that the evidence referred to did not affect the question (Record 70-71) and none of the appellees appealed.

"To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony of testator's state of health at

the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence."

Barber vs. Pittsburgh, etc. Ry. 166 U. S. 83, 109.

Evidence that a will made two days before testator's death and that he then had no personal property is not admissable to show his intention.

McGough vs. Hughes, (R. L.) 30 Atl. 851.

As to the second contention—the first decision of the Supreme Court partly reversed and partly affirmed the decree of the Circuit Judge and remanded the case for further proceedings (Record 63, 66-68). Further proceedings were had and a decree entered (Record 72-73), and appallants again appealed to the Supreme Court which entered a decree on March 8, 1922 (Record 85). This was the first decree entered in the Supreme Court and the first opportunity appellants had of appealing to this Court.

"Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii * * * wherein the amount involved * * * may be taken and prosecuted in the Circuit Court of Appeals."

38 Stat. L. 804; 6 Fed. Stat. Ann. 145.

In Rumsey vs. New York Life, 267 Fed. 554, this Court held that in Hawaii an order by the Supreme Court remanding a case to the Court below for further action is not final so as to be appealable to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 23rd, 1923.

Respectfully submitted,

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